

No. 15,667

IN THE

United States Court of Appeals
For the Ninth Circuit

LORENZO WHITE, JOYCE HARPER and
RUBY FIELDS,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court of the United States for the
District of Alaska, Fourth Judicial Division.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

JURISDICTION.

The jurisdiction of the District Court below was based upon the Act of June 6, 1900, c. 786, Section 4, 31 Stat. 322, as amended, 48 U.S.C. 101.

The jurisdiction of this Court of Appeals is invoked pursuant to the Act of June 25, 1948, c. 646, 62 Stat. 929, as amended, 28 U.S.C. 1291.

COUNTERSTATEMENT OF THE CASE.

In December, 1955, Lorenzo White operated the Morocco Club, a bar, located in South Fairbanks.

Joyce Harper and Ruby Fields worked at the Club as hostesses (TR 41) and were close friends. White and Harper were living at 721 16th Street in a house which White owned.

On December 11, 1955, Ruby Fields left Fairbanks, Alaska, by plane and arrived in Los Angeles, California, on the 12th, after which she went directly to her mother's house (TR 185).

On December 14, 1955, Robert Thompson, a Deputy United States Marshal, requested the Postmaster, Mrs. Boyle, to look for a package mailed from Los Angeles to a fictitious person in Fairbanks. He further stated to her that it probably would be picked up by a cab driver (TR 45). On December 15 Mrs. Boyle examined all the parcels that came from Los Angeles and selected an insured one which had a fictitious name, Myrtle Hicks, as addressee. A telephone call was made to the Postal Inspector in Charge at Seattle. After ascertaining its character as fourth-class mail, Mr. Brady, a District Operation Manager of the Postal Department, authorized the Postmaster to open the package (TR 84). Mrs. Boyle then opened the package, which contained a light blue garment and a gelatin-like envelope with white powder. The garment had a cleaning tag on it with the letters "Fiel". Mrs. Boyle testified that the package had to be fourth-class mail to be insured. She examined the meter strip on the package and the postage was \$2.60. If the postage was \$2.60, the package would weigh three pounds, which at eighty cents a pound would be a total of \$2.40 plus twenty cents for the insurance fee. The

package was then sealed and placed in the general delivery mail.

On December 15 Willie Stanton, a cab driver, received a call to go to 721 16th Street, where Lorenzo White and Joyce Harper lived. Harper asked him to pick up the mail and some dog food. She also gave him a note with the name Myrtle Hicks written on it which he was to present at the Post Office when he called for the mail. On December 16 William Taylor, another cab driver, was sent to purchase a pair of stockings and to call for a package at the Post Office for Myrtle Hicks. He was attempting delivery of the stockings and looking for 731 16th when a colored girl in a red house motioned for him. He delivered the stockings to her and advised there was no mail and that there was a package but it hadn't been brought up from the back yet (TR 100). The next day he received a call to pick up a package for Myrtle Hicks and deliver it to Jenkins.

On December 17 Lorenzo White talked with Jenkins, a taxi driver, at 721 16th, and asked him to pick up a package at the Post Office addressed to Myrtle Hicks at 731 16th. Jenkins received the package from Taylor, but upon delivering it at 721 16th, he told Joyce Harper that there were some officers with him. This conversation was in a low tone of voice so no one but she could hear it (TR 108).

Briggs J. White, a chemist and toxicologist for the Federal Bureau of Investigation Laboratory in Washington, D. C., analyzed the white powder in the glas-

sine envelopes and determined it to be the narcotic, heroin.

Mr. Latona, a fingerprint examiner for the Federal Bureau of Investigation, found four latent prints of the appellant Fields on the glassine envelopes.

Mrs. James, supervisor of Sani System Cleaners in Fairbanks, identified the ticket on the dress as their ticket.

Fields was arrested at Los Angeles, California, on December 27, 1955, by Treasury Agents Goodman and Carpenter (TR 183-184).

After the government had rested its case, the appellant Fields took the stand and testified that she sent the package, but denied that her associates had anything to do with it.

An indictment was returned by the grand jury on February 15, 1956, and a superseding indictment was returned on May 25, 1956, charging the appellant Fields in Count I with transportation of a narcotic drug; Count II importation of a narcotic drug; Count III conspiracy; Count VI mailing a poisonous drug; Count VII conspiracy (TR 3-9). The other appellants were also indicted on all counts except Count VI. On May 6, 1957, trial commenced in the District Court for the District of Alaska, Fourth Judicial Division, and on May 9, 1957, the jury returned a verdict of guilty as to all counts upon which the appellants were indicted.

Judgments were entered on June 6, 1957, wherein the appellants were sentenced to five years on Counts

I, II, III and VII, the sentences to run concurrently. Fields received a sentence of two years on Count VI to run concurrently with the other sentences. Motion for a new trial was filed on May 14, 1957, and was denied. Appellants filed a notice of appeal on June 11, 1957.

QUESTIONS PRESENTED.

Whether appellants' motion to suppress the package containing the heroin was timely made pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure.

Whether appellants had the right to have Exhibits D, E and G suppressed when the exhibits were not seized and without their claiming an interest or right in them.

Whether the Court erred in admitting the package and heroin, Exhibits F, H, I, J and K.

ARGUMENT.

I.

APPELLANTS FAILED TO MAKE A TIMELY MOTION TO SUPPRESS THE PACKAGE PURSUANT TO RULE 41(e) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

On May 25, 1956, the indictment in this case was returned by the grand jury. On August 27, 1956, the appellants entered pleas of not guilty to the charges and the trial commenced on May 6, 1957. During this year no motion to suppress the heroin was made.

Rule 41(e) of the Federal Rules of Criminal Procedure provides that the motion shall be made before the trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, . . .

Since the above Rule uses the word shall, it would appear that a timely motion must be taken to secure a judicial determination of claims of illegality on the part of agents of the government in obtaining evidence.

The appellant Fields knew that the government had possession of the package (TR 185, 186), and the indictment describes the package with such particularity as would be impossible without the government having seized it.

The record does not show any reason why the appellants did not make the motion prior to trial or earlier in the trial, especially after the Deputy United States Marshal and the Postmaster had testified. Now, on appeal after discovering their waiver, counsel simply state in their brief that no opportunity was given to so move before their first objection. The appellants were adequately represented by counsel as both Mr. Hepp and Mr. McNealy were former United States Attorneys.

This Court in *Rose v. U.S.*, 149 F. 2d 755, 760 (9th Cir. 1945), stated, "Objection to the use of the tires as evidence was made for the first time when they were offered into evidence, more than seven months after they were seized, and again on motion for arrest of judgment. The point was not seasonably raised,

even assuming the search and seizure illegal, and therefore must be considered waived.” See *Segurola v. U.S.*, 275 U.S. 106, 112 (1927); *Peters v. U.S.*, 97 F. 2d 500, 502 (9th Cir. 1938); *U.S. v. Salli*, 115 F. 2d 292 (2nd Cir. 1940); *Sandez v. U.S.*, 239 F. 2d 239, 242 (9th Cir. 1956).

Appellants rely on *Gouled v. U.S.*, 255 U.S. 298 (1921), but in that case the defendant had moved to suppress the evidence in advance of the trial and then the same objection was raised at the time of trial. However, the Court did state on page 305 of the opinion that an objection was not too late where the papers had been taken by an acquaintance in his absence and the defendant did not know that the papers had been taken until the acquaintance appeared on the witness stand.

II.

THE APPELLANTS DID NOT HAVE THE RIGHT TO HAVE EXHIBITS D, E AND G SUPPRESSED AS EVIDENCE ON THE GROUNDS OF ILLEGAL SEARCH AND SEIZURE.

Exhibit D (TR 128), government’s identification 6 (TR 53, 55), was the wrapper from the transmittal box which was sent to the FBI Laboratory. Robert Thompson, the Deputy United States Marshal, prepared this wrapper so the package containing the narcotics, which was inside the box, could be mailed to the experts for examination.

Exhibit E (TR 129, 130), government’s identification 4 (TR 54), was the box which Mr. Thompson

used to send the package, which contained the heroin, to the FBI Laboratory, and the same box was returned to the United States Marshal after the examinations were made.

Exhibit G (TR 131, 132), government's identification 11 (TR 90), was the outside wrapper from the box which special agent Briggs J. White sent air express to Mr. Dorsh, the United States Marshal at Fairbanks, Alaska, after they had completed their examination of the package and its contents.

These exhibits were offered and admitted for the purpose of showing a chain of evidence from the time the package was received from the Postmaster until introduced at the trial. None of these exhibits were ever in the possession of the appellants. At the time the objections were made, they did not claim an interest or right to them. The burden was on the appellants to prove to the trial Court the facts necessary to sustain their objection. *Nardone v. U.S.*, 308 U.S. 338, 341 (1939).

The Tenth Circuit held in *Wilson v. U.S.*, 218 F. 2d 754, 756 (10th Cir. 1955), "The law is well settled that the protection of the Fourth Amendment to the Constitution against unreasonable search and seizure is personal to the one asserting it, and one who claims no proprietary or possessory interest in that which has been seized as a result of a search may not object to its introduction in evidence." See *Accardo v. U.S.*, 247 F. 2d 568, 569 (U.S. App. D.C. 1957). Since there was no search and seizure of these exhibits and the

appellants did not claim an interest in them, the Court did not err in their admission.

III.

THE COURT DID NOT ERR IN ADMITTING EXHIBITS F, H, I, J AND K.

Exhibit F (TR 131), government's identification 1, was the wrapper and cardboard box that contained the heroin and dress. Exhibit H (TR 114), government's identification 3 (TR 51), was part of the dress that was inside the package. Exhibit I (TR 135), government's identification 2 (TR 51), was the other part of the dress. Exhibit J (TR 157), government's identification 15 (TR 155), was the two glassine envelopes which were in the package wrapped in the fold of the dress. Exhibit K (TR 159), government's identification 14 (TR 155), was the box containing the heroin which had been removed from the glassine envelopes. All of these exhibits made one package, which was opened by the Postmaster and the District Operation Manager of the Postal Department. They had previously called the Postal Inspector in Charge at Seattle and verified that the package was fourth-class mail and it could be inspected (TR 72, 84). The postage on the meter stamp was \$2.60 (TR 76). The above exhibits have been forwarded as part of the record to this Court. Just by examining the exhibits, this Court will at once recognize the fact that the package weighed over eight ounces. The Postmaster testified that if the postage was \$2.60, it probably

weighed three pounds at eighty cents a pound, which would be \$2.40, and possibly twenty cents for the insurance (TR 76). This testimony is consistent with the statute on air parcel post service, 39 U.S.C.A. 475 (8). This package was insured, and only third- and fourth-class mail may be insured, 39 C.F.R. 52.1(b). This package weighed over eight ounces, so it could not be third-class mail, 39 C.F.R. 24.3.

Congress has provided for postage on such packages, 62 Stat. 1097, 39 U.S.C.A. § 475:

“Air parcel-post service; rates; rules and regulations; adjustment of weight limits, zones, and rates, etc. The rate of postage on mailable matter exceeding eight ounces in weight, but not weighing more than seventy pounds nor measuring more than one hundred inches in length and girth combined, when carried by air and including other transportation to and from air-mail routes, shall, except as otherwise provided in this section, *be determined on the basis of the eight postal zones established for fourth-class matter*, as follows:
 . . .”

In any event, as already pointed out, the package here was not matter bearing first-class or letter postage, but fourth-class mail upon which fourth-class postage was paid.

The Court in the case of *Oliver v. U.S.*, 239 F. 2d 818, 822 (8th Cir. 1957), commented as follows, “At the time of the Jackson decision, there existed a statute, 17 Stat. 301, 39 U.S.C.A. § 251, not directly related to the situation involved in the case and for that reason presumably not referred to in the general discussion of the opinion, which provided that ‘Post-

masters at the office of delivery may remove the wrappers and envelopes from mail matter not charged with letter postage, when it can be done without destroying them, for the purpose of ascertaining whether there is upon or connected with any such matter anything which would authorize or require the charge of a higher rate of postage'."

Although this statute was not applicable in their fact situation because the Court found the package to be first-class mail, this Court should consider it pertaining to this package which was fourth-class matter and was not charged with letter postage.

39 U.S.C.A. 243 provides all matter of the fourth-class shall be subject to examination. An examination of the authorities does not disclose a case in point. However, the Sixth Circuit in the case of *Webster v. U.S.*, 92 F. 2d 462 (6th Cir. 1937), held in a per curiam opinion as follows: "The Court being of the opinion that inspection by the Post Office Department of an unsealed package not having upon it stamps sufficient to qualify it as first class mail was not an invasion of appellant's immunity from unreasonable search and seizure, . . ."

From every indication in the *Oliver* case, if the package had weighed eight and one-half ounces, it would have been sent air mail parcel post, and as the opinion apparently recognized (page 823, fn. 3) there would have been no question as to the authority of the postal authorities to inspect the package.

In *Ex Parte Jackson*, 96 U.S. 727, 733 (1877), the Supreme Court stated, "In their enforcement, a dis-

inction is to be made between different kinds of mail matter—between what is intended to be kept free from inspection, such as letters, and sealed packages subject to letter postage; . . .” Although the above appears to be dicta, the Eighth and Tenth Circuits have followed it as precedent in deciding the illegality of a search of first-class mail on which letter postage has been paid. However, there appears to be no reason why this Court should extend the *Jackson* case to cover other classes of mail on which letter postage is not paid.

Appellants also urge this Court to declare 39 U.S.C.A. 243; 700 unconstitutional, evidently on the authority of *Ex Parte Jackson*. These statutes are not in conflict with that opinion because letter postage is not paid on fourth-class matter.

CONCLUSION.

It is respectfully submitted that the judgments entered by the District Court should be affirmed.

Dated, Fairbanks, Alaska,
December 13, 1957.

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(Appendix Follows.)

Appendix.

Appendix

IDENTIFICATIONS AND EXHIBITS.

Identification	Identified	Exhibits	Received
Government's 6	TR 55	D	TR 128
Government's 4	TR 53	E	TR 130
Government's 1	TR 50	F	TR 131
Government's 11	TR 90, 131	G	TR 132
Government's 3	TR 51, 132, 133	H	TR 134
Government's 2	TR 51, 134	I	TR 135
Government's 15	TR 155	J	TR 157
Government's 14	TR 155	K	TR 159

FEDERAL RULES OF CRIMINAL PROCEDURE.

Rule 41(e). *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The

motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the Court in its discretion may entertain the motion at the trial or hearing.

CODE OF FEDERAL REGULATIONS.

39 § 24.3. *Weight and size limitations*—(a) *Weight*. The weight of each addressed piece may not exceed 8 ounces, except letters for the blind (See Part 28 of this chapter).

39 § 52.1(b). *Classes of mail to which applicable*. You may insure only third- and fourth-class mail. The mail must bear the complete names and addresses of sender and addressee. The following are not acceptable for insurance:

UNITED STATES CODE ANNOTATED.

39 § 251 (17 Stat. 301). *Same; removing wrappers*. Postmasters at the office of delivery may remove the wrappers and envelopes from mail matter not charged with letter postage, when it can be done without destroying them, for the purpose of ascertaining whether there is upon or connected with any such matter anything which would authorize or require the charge of a higher rate of postage thereon.

39 § 475 (62 Stat. 1097). *Air parcel-post service; rates; rules and regulations; adjustment of weight*.

limits, zones, and rates, etc. The rate of postage on mailable matter exceeding eight ounces in weight, but not weighing more than seventy pounds nor measuring more than one hundred inches in length and girth combined, when carried by air and including other transportation to and from air-mail routes, shall, except as otherwise provided in this section, be determined on the basis of the eight postal zones established for fourth-class matter, as follows:

39 § 243. *Same; disposition of nonmailable matter.* All matter of the fourth class shall be subject to examination. If any matter excluded from the mails by section 240 of this title, except that declared nonmailable by section 334 of Title 18, shall, by inadvertence, reach the office of destination, the same shall be delivered in accordance with its address. The party addressed shall furnish the name and address of the sender to the postmaster at the office of delivery, who shall immediately report the facts to the Postmaster General. If the person addressed refuse to give the required information, the postmaster shall hold the package subject to the order of the Postmaster General. All matter declared nonmailable by section 334 of Title 18, which shall reach the office of delivery, shall be held by the postmaster at the said office subject to the order of the Postmaster General.

39 § 475(8). For air parcels exchanged between offices in continental United States and offices in Territories and possessions of the United States, in either direction, and between offices within such Territories and possessions, the applicable zone rate shown

in paragraphs (1) to (6) of this section shall apply to and including the seventh zone: *Provided*, That for offices falling in the eighth zone the rate of postage for air parcels weighing in excess of eight ounces shall be 80 cents for each pound or fraction thereof.

39 § 700. *Searches authorized.* The Postmaster General may, by a letter of authorization under his hand, to be filed among the records of his department, empower any post-office inspector or other officer of the Post Office Establishment to make searches for mailable matter transported in violation of law; and the inspector or officer so authorized may open and search any car or vehicle passing, or having lately before passed, from any place at which there is a post office of the United States to any other such place, or any box, package, or packet, being, or having lately before been, in such car or vehicle, or any store or house, other than a dwelling house, used or occupied by any common carrier or transportation company, in which such box, package, or packet may be contained, whenever such inspector or officer has reason to believe that mailable matter, transported contrary to law, may therein be found.